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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1005

ALTON BOX BOARD COMPANY, *et al.*,
Petitioners,

v.

THREE J FARMS, INCORPORATED, *et al.*, in behalf of themselves and all other parties similarly situated and circumstanced,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Counter-Question Presented

Respondents submit that there is really only a single question presented to this Court in this Petition and the law is well settled in connection therewith. The single question is that, where a Court grants remand under 28 USC 1447(c), and where the Order of remand has any legal basis whatsoever, the Court thereafter loses jurisdiction over the case and cannot change its mind for any reason.

Respondents submit that the law is well settled in this connection, the most recent case being *Volvo of America vs. Schwarzer*, 429 US 1331, 97 Sup. Ct. 284, 50 L.Ed 2d. 273.

While respondents will respond to the other questions presented in this petition, it is submitted that the above counter-question effectively disposes of the petitioner's arguments and that the grant of a petition for a writ of certiorari in this case would merely burden this Court with a re-definition of already well-defined law.

Counter-Statement of the Case

On the argument of the present case before the United States Court of Appeals for the Fourth Circuit, in response to a question from Circuit Judge Field, the attorney for the respondents (Petitioners here) was specifically asked whether there was any additional fact which was brought to the attention of the Court in the respondent's memorandum submitted to the Court after the Court withdrew its initial Order of Remand and the papers that had previously been submitted to the Court in connection with the stay application which had been initially denied by the District Judge. The respondents (Petitioners here) conceded that no such new matter was presented. This significant fact has not been brought to the attention of this Court by the petitioners and this fact, even standing alone, is sufficient to warrant summary denial of this petition.

POINT ONE

So long as a court remands an action under any rational basis under 28 USC 1447 (provided that the case is not a civil rights action) the Order of Remand is not reviewable for any cause whatsoever.

The precise question involved in this petition came up for review before Mr. Justice Rehnquist in *Volvo of America Corporation vs. W. Schwarzer,* supra. In that case the District Court granted remand of a State Anti-Trust Action (even though the requisite diversity was present) upon the ground that only a few members of the class had the requisite jurisdictional amount. In denying a stay application in that matter Mr. Justice Rehnquist held as follows (97 Sup. Ct. 285):

> The flaw in this argument is that, while the District Court may have been wrong in its analysis, it clearly stated, citing to Section 1447 (c), that it considered itself without jurisdiction. The District Court therefore thought it was acting in accordance with Section 1447(c), which allows a remand where an action is "removed improvidently and without jurisdiction." Review of this order, therefore, is presumptively barred by the operation of 28 U.S.C. Section 1447(d).

> We held last term in *Thermatron Products, Inc. vs. Hermansdorfer,* 423 US 336, 96 Sup. Ct. 584, 46 L.Ed 2d 542 (1976), where the District Court ordered a remand because of its crowded docket, that Section 1447(d) did not bar review of remand orders 'issued on grounds not authorized by Section 1447(c)'. (citation omitted) But the District Court here *did* base its order on 1447(c). *Thermatron* is of no help to applicant as the remand was explicitly based on an alleged erroneous finding that the court 'does not have jurisdiction of this action'. (citation omitted) Applicant's position would mean that any allegedly erroneous application of Section 1447(c) would be reviewable by writ of mandamus, leaving the Section 1447(d) bar extant only in the case of allegedly proper applications of Section 1447(c), a reading too Pickwickian to be accepted and contrary to the clear language in *Thermatron.*

In *Thermatron,* supra, itself, at 423 US 343 the Court held as follows:

> "It is unquestioned in ;this case and conceded by petitioners that this section (Section 1447[d]) prohibits review of all remand orders issued pursuant to Section 1447(c) *whether erroneous or not****If a trial judge purports to remand 'improvidently and without jurisdiction' his order is not subject to challenge in the court of appeals, *by mandamus or otherwise."* (emphasis supplied.)

The original Order of the District Court (See Appendix annexed to this Response) specifically remanded the case under 28 USC 1447(c) the Order of October 13th, 1978 reads in part as follows:

> "Having among its parties three plaintiffs and one defendant who are citizens of South Carolina and one plaintiff and seven defendants who are citizens of New York, this case lacks complete diversity of citizenship among all of the parties and is not sustainable in this court under 28 USC 1332. In addition no federal question is involved, leaving this Court without any jurisdiction over the case. Under these circumstances, it is the duty of this Court pursuant to 28 USC 1447(c) to remand the case to the state court'

Thus, the case at bar is merely one of a long series of cases holding that, where a District Court remands an action, and there is any reasonable basis for its action, its action so

remanding the case is not subject to review and the District Court cannot thereafter change its mind. See, for example, *Gravitt vs. Southwestern Bell Telephone Co.*, 430 US 723 (1977); *Sullivan vs. Simons*, 337 F.2d. 239 (4 Cir. 1964); *In Re La Providencia Development Corporation*, 405 F.2d. 251 (1 Cir. 1969).

Petitioners cite a number of cases holding that a District Court has Rule 60(b) power to review its own orders and judgments and to correct them. This is true, of course, in cases properly before District Courts. However Congress, in its wisdom, did not give District Courts the power to review remand orders after they were issued. Indeed, if this Court were to so hold the provisions of 28 USC 1447(d) would be eroded since the power of a court to review orders and judgments under Rule 60(b) is very wide and, given this power, a case could conceivably "ricochet" between state and federal forums indifinitely.

POINT TWO

The real basis of the present petition is to prevent state court consideration of exclusively state claims.

While "POINT ONE" of this response disposes of the issues involved in this petition, the respondents point out that the real reason for the present exercise is to attempt to prevent State Court consideration of State Law Claims. Thus, while the Federal Anti-Trust Laws provide for treble damages for price fixers, South Carolina State Anti-Trust Laws, and the laws of Kansas and Missouri, provide for reimbursement of the *full purchase price* to the purchasers of price-fixed goods. In the *Corrugated Container Anti-Trust Litigation* the defendants have been able to "buy off" class anti-trust claims for less than 3 cents on the dollar of sales. Contrarywise, in the case of South Carolina, no State Court would approve such a settlement where the "exposure" is 100% of the sales price of the goods. This, of course, was the reason that the State Court issued its injunction against settlement of these claims without its approval.

This Court has repeatedly held that purely State Claims will not be adjudicated by Federal Courts. See, for example, *Cort vs. Ash*, 422 US 66 (1974); *Santa Fe Industries, Inc. vs. Green*, 430 US 462; *Piper vs. Chris-Craft Industries*, 430 US 1.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be in all respects denied.

Dated: January 2, 1980

Respectfully submitted,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

Order of US District Court of District of South Carolina Remanding Cause to Court of Common Pleas of Spartanburg County Dated October 13, 1978 (61-68)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION
Civil Action No. 78-1257

Three J Farms, Incorporated; U. S. Textile Corporation; Shapiro & Son Bedspread Corporation; and Troy H. Cribb & Sons, Inc., in behalf of themselves and all other parties similarly situated and circumstanced,

Plaintiffs,

vs

Alton Box Board Company, *et al.*,

Defendants.

This action was removed by defendants from the Court of Common Pleas, County of Spartanburg, South Carolina, to this court on July 31, 1978, and is presently before the Court on the motion of plaintiffs to have the case remanded to that state court. As could be expected of any suit that alleged extensive antitrust violations on the part of approximately 40 defendants, there has been a flurry of procedural activity since the case's recent arrival in this court. The plaintiffs base their claim against the defendants on the antitrust provisions of the South Carolina Code, Section 39-3-10 *et seq.*, S. C. Code (1976), alleging that certain concerted action by the defendants in the corrugated container industry violated these provisions. The Judicial Panel on Multidistrict Litigation in response to sizable number of lawsuits over the nation with similar allegations ordered a large number of these actions from other jurisdictions to be transferred to the United States District Court for the Southern District of Texas for

coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. Section 1407. *In re Corrugated Container Antitrust Litigation*, 441 F.Supp. 921 (1977). On August 11, 1978, the Panel issued a conditional transfer order removing this action to the Texas court in reliance on its earlier rulings regarding similar litigation.

Plaintiffs have objected to the transfer by the Panel and on August 16, 1978 filed a notice of opposition with the Panel. On this same day, plaintiffs also filed in this Court their motion to remand the case to the state court from which it arose. Plaintiffs then filed with the Panel a motion to vacate the conditional transfer order and a memorandum in support of that motion. Meanwhile, the defendants made motion before this Court for an order staying further proceedings until the Panel's determination regarding the plaintiff's motion to vacate the action taken earlier by that body.

Once a transfer by the Panel of a case becomes final and the transfer order is filed with the clerk of the transferee court, the transferor court loses all jurisdiction and power over pretrial proceedings until the action is later returned to it. However, if notice of objection to a conditional transfer order is filed with the Panel and a motion to vacate the transfer accompanied by a supporting memorandum is additionally filed within 15 days of the filing of the notice of objection, as was done in the present case, the conditional transfer order will not be transmitted to the transferee court and thus will not become effective since such orders do not complete a transfer unless they are filed with the clerk of the transferee court. Rule 9 of the Rules of Procedure of the Judicial Panel on Multi-district Litigation. Since the transfer of this case has been arrested until further order of the Panel, the transferor court still has full power and jurisdiction to rule upon matters properly presented to it for decision. *In re Air Crash Disaster at Paris, France, on March 3, 1974*, 376 F.Supp. 887 (Jud. Pan. Mult. Lit. 1974); Rule 16 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. A decision by this Court on plaintiffs' motion to remand at this time is proper, timely and necessary.

The defendants have made motion before this Court for a stay of further proceeding until the Panel has disposed of

plaintiffs' motion to vacate. The defendants argue that judicial efficiency and consistency, two essential purposes of 28 U.S.C. Section 1407, would be frustrated were this Court to act on plaintiffs' motion and that the Panel, not this Court, provides the proper tribunal for deciding the question of remand. Consideration of removal of this action, however, deals with the subject matter jurisdiction of this court, and any past or future handling of this case by the Panel does not dispense with this fundamental prerequisite. In dispelling the notion that action by the Panel somehow does away with ordinary jurisdictional considerations of removal, the Court in *Bancohio Corporation v. Fox*, 516 F.2d 29, 32 (6th Cir. 1975) stated the following:

> Neither does the statute on multidistrict litigation, 28 U.S.C. Section 1407, compel a different result . . . [T]here is nothing in the applicable statute to provide an exception to the rules normally governing removal of cases from state courts. Such a transfer [by the Panel] cannot be made unless the district court properly has jurisdiction of the subject matter.

Contrary to what defendants advocate, both money and time in this matter would be saved by having this Court now analyze the jurisdictional question, for an existing jurisdictional deficiency would nullify any proceedings by or before the Panel.

Scrutiny of the face of plaintiffs' complaint reveals no basis for federal jurisdiction over this action. Plaintiffs premise their action exclusively on South Carolina antitrust law and expressly state they do not charge any Federal Law violations, thus excluding federal question jurisdiction. Moreover, the case apparently lacks diversity jurisdiction under 28 U.S.C. Section 1332 since there is not complete diversity of citizenship between the parties — three plaintiffs and two of the individual defendants are citizens of South Carolina and one plaintiff and numerous corporate defendants are citizens of New York. To support their argument that this Court has subject matter jurisdiction over this action, the defendants contend that the plaintiff New York corporation, Shapiro & Son Bedspread Corporation, and the two South Carolina defendants, Tim Poffenbarger and Ennis McCarter, are not

proper parties but were improperly joined for the sole purpose of defeating diversity jurisdiction. Defendants rely on the long standing principle that the right to remove to federal court cannot be defeated by joining formal or unnecessary parties. *Salem Trust Co. v. Manufacturers' Finance Co.*, 264 U.S. 182, 445 S.Ct. 266, 68 L.Ed. 628 (1924).

Defendants raise the issue of whether the parties whose citizenship prevents complete diversity are proper parties to this action. In delineating a test for determining if a defendant is a proper party to be considered for diversity purposes upon removal, this Court in *Jacks v. Torrington Company*, 256 F.Supp. 282 (D.S.C. 1966), addressed the matter of fraudulent joinder as follows:

> Defendants also removed upon the ground of improper and fraudulent joinder of Wassung [an employee of the out of state corporate defendant]. The issue is one of fraud in a legal sense and in no way involves the integrity of plaintiffs or the professional conduct of their counsel. The issue is, rather, whether the futile joinder of a party against whom no valid claim for relief is stated will be permitted to defeat diversity jurisdiction which would otherwise exist against remaining defendant . . . Should these allegations not constitute a valid claim for relief against Wassung then he is not a proper party; there is no basis for his joinder; and such a joinder to prevent removal would in law amount to a legal fraud upon defendants. 256 F.Supp. at 285, 286.

In deciding whether plaintiffs have a valid claim for relief against defendants Poffenbarger and McCarter, the Court must see if Section 39-3-10 *et seq.*, S. C. Code (1976), casts liability upon them in light of the allegations of the complaint. Plaintiffs have submitted the affidavit of Kenneth Cribb, who avers that Pofferbarger was the representative of and salesperson for defendant Packaging Corporation of America. Plaintiffs' affidavit of James Gossett regarding McCarter states that although plaintiff Three J Farms, Inc. purchased corrugated boxes from defendant Westvaco through him the exact relationship between McCarter and Westvaco remains unknown to them. Defendant has not contested these affidavits with any opposing affidavits.

In *State v. National Linen Service Corp.*, 225 S.C. 232, 815 S.E.2d 342 (1954), the South Carolina Supreme Court construed the statute upon which plaintiffs base their complaint and held that agents or employees of a corporation when working to promote the corportion's business could not be found to conspire with the corporation. The discussion and interactions between the corporation and its agents when performed in furtherance of the corporate business cannot be held, according to the reasoning of that case, to constitute illegal concerted action under the statute because to do so would be tantamount to holding that a corporation could conspire with itself. Applying this substantive law to the facts as alleged in the complaint and averred in plaintiffs' affidavit of Kenneth Cribb, it appears that plaintiffs would not have valid claim against defendant Poffenbarger. Plaintiffs have gone no farther than attempting to establish that Poffenbarger was a representative of defendant Packaging Corporation of America who, with knowledge of the alleged intercorporate conspiracy, would quote noncompetitive prices to plaintiff T. H. Cribb & Sons, Inc. in order to sell his employer's product. It is not contended by plaintiffs that Poffenbarger acted independently of his employer with any of the other corporate defendants. Under *State v. National Linen Service Corporation*, 225 S.C. 232, 81 S.E.2d 342 (1954) Poffenbarger's conduct with his employer does not appear actionable under Section 39-3-10 S.C. Code (1976) since, according to the record, he never acted as more than an agent of a corporation which itself is a named defendant.

This same rationale used to determine that no valid claim against defendant Poffenbarger is stated in the complaint would apply also as to defendant McCarter to reach the same conclusion were it not for the fact that the affidavit of James L. Gossett fails to fully specify the exact relationship between this individual defendant and defendant Westvaco Corporation. In particular, it is still unclear if McCarter was merely a sales representative of Westvaco or worked for himself or another independent business entity. Since there is a question whether this defendant was acting in an individual business capacity in relation to other corporate defendants and may have been capable of engaging in the alleged unlawful

conspiracy, this Court determines on the basis of the record before it that defendant McCarter is a proper party to this action for whom there exists a basis for joinder as a defendant.

The determination of whether a plaintiff is more than a nominal party and is an actual real party in interest for diversity purposes involves a similar analysis of ascertaining "who, under governing substantive law, is entitled to enforce the right asserted." *Iowa Public Service Commission v. Medicine Bow Coal Company*, 556 F.2d 400, 404 (8th Cir. 1977). In the affidavit of Jerry Shapiro, it is averred that plaintiff Shapiro & Son Bedspread Corporation purchases items packaged in corrugated containers from plaintiff U. S. Textile Corporation on a "cost-plus" basis. Although the Court is somewhat confused regarding the plaintiffs' characterization of these two corporations as a "joint economic unit", it would seem that any economic injury resulting from the alleged higher noncompetitive price paid for the containers in which goods were shipped from U. S. Textile Corp. to Shapiro & Son Bedspread Corp. would be suffered by the latter since it was purchasing on the cost plus basis. Section 39-3-30, S.C. Code (1976), gives the right of action for violation of this state's antitrust provisions to "any person who may be injured or damaged by any such arrangement, contract, agreement, trust or combination." The facts alleged by plaintiff Shapiro & Son Bedspread Corp. confer upon it under South Carolina law a right of action against the defendants; therefore, this Court determines on what is before it that Shapiro & Son Bedspread Corp. is a proper plaintiff.

Defendants have failed to show that the joinder of Ennis McCarter as a defendant and Shapiro & Son Bedspread Corp. as a plaintiff is fraudulent and improper with the purpose of defeating diversity jurisdiction. Having among its parties three plaintiffs and one defendant who are citizens of South Carolina and one plaintiff and seven defendants who are citizens of New York, this case lacks complete diversity or citizenship among all the parties and is not sustainable in this court under 28 U.S.C. Section 1332. In addition no federal question is involved, leaving this court without any jurisdiction over the case. Under these circumstances, it is the duty

of this Court pursuant to 28 U.S.C. Section 1447(c) to remand the case to the state court. No matter how numerous are the common questions of fact at issue in this case and those cases which the Judicial Panel on Multidistrict Litigation has consolidated for pretrial discovery in *In re Corrugated Container Antitrust Litigation*, 441 F.Supp. 921 (Jud. Pan. Mult. Lit. 1977), the absence of jurisdiction of this court is fatal to defendants' attempt to remove the action from state court. The statute on multi-district litigation, 28 U.S.C. Section 1407, does not confer jurisdiction nor provide an exception to the requirement of jurisdiction when this fundamental element is not otherwise met. For the foregoing reasons, this Court finds that the complete absence of subject matter jurisdiction necessitates a remand of this case to the Spartanburg County Court of Common Pleas.

IT IS, THEREFORE, ORDERED that defendants' motion for a temporary stay of proceedings be and the same is hereby denied.

IT IS FURTHER ORDERED that plaintiffs' motion to remand this action to the Court of Common Pleas for the County of Spartanburg, South Carolina, be and the same is hereby granted.

AND IT IS SO ORDERED.

/s/ Robert F. Chapman
ROBERT F. CHAPMAN
United States District Judge

October 13th, 1978

Columbia, South Carolina

TRUE COPY
Test:
MILLER C. FOSTER, JR. CLERK
/s/ Tanya Carson
By: Deputy Clerk